at any one time. But he seems to be clearly in error in regarding law as properly a body of abstract principles divorced from political principles and administered by a group of passionless persons. So long as society is developing, law also must develop, and in any system of government those who administer the law will be influenced by social changes and will themselves serve to some extent at least as instruments for the adaptation of law to those changes. A system of courts absolutely free from political and social influences would be equally as harmful as a system dominated by such influences.

The Supreme Court and Unconstitutional Legislation. By BLAINE FREE MOORE. (New York: Columbia University Studies in History, Economics and Public Law, vol. liv, no. 2, 1913. Pp. 158.)

Dr. Moore's monograph contains three chapters dealing respectively with the early attitude of the state courts toward judicial control over legislation, the attitude of the United States Supreme Court in passing upon the constitutionality of state and federal statutes, and an analysis of the federal statutes held void by the Supreme Court of the United States. These chapters are followed by valuable tables of cases in the Supreme Court of the United States, in which statutes have been held invalid. For the state statutes declared unconstitutional a chronological list of cases is given, and there are also tables arranged by States and by the constitutional clauses with which the legislation was held to conflict. There are also statistical summaries of state statutes held unconstitutional by the Supreme Court of the United States, and of cases in which statutes contested as unconstitutional have been upheld.

Aside from the first chapter the discussion is confined entirely to action by the Supreme Court of the United States. In his discussion of the court's attitude in cases holding laws unconstitutional, Dr. Moore refers to cases in which no reluctance was expressed when federal statutes were nullified, and assumes that the attitude of the court has in most cases not been one of reluctance. He refers then to a number of the earlier cases affecting state statutes in which the court did express reluctance, and says that before 1832 the court exercised such power with respect to state statutes with great reluctance, and that a change came into this attitude after 1832 (pp. 65, 66). The reviewer wonders if Dr. Moore has not given too much weight to judicial expressions, which in many cases merely paid lip-service to the principle already announced, that the courts would declare laws unconstitutional only with great

reluctance and when the unconstitutionality was clear beyond a reasonable doubt. There was a change of language, perhaps, due in part to the change in the position of the States, especially after the Civil War, yet *it must be* remembered that the earlier expressions of deference did not interfere with the continuous exercise of power by the United States Supreme Court to declare state statutes unconstitutional. Moreover, under Taney's chief-justiceship some state laws were upheld which would clearly have been annulled while Marshall was on the court, and an annulling with an expression of reluctance was, in fact, as to some cases, a stricter use of judicial power than after 1832 (Warren Bridge Case and Briscoe vs. Bank of Kentucky). Of course in recent years, the frequent exercise of judicial power under the broader constitutional guaranties has brought about a substantial change in the attitude of the courts, but no essential change in judicial attitude can be said to have taken place about the year 1832.

With respect to judicial expressions concerning reasonable doubt and reluctance to pass upon the question of constitutionality, Dr. Moore comes close to the point when he remarks that such expressions are more frequently found in dissenting opinions. Had he extended the study to cases in which statutes have been upheld, he would have found that the determination to sustain legislation is frequently supported by the statement that courts are reluctant to declare statutes invalid unless the conflict with the constitution is clear beyond a reasonable doubt. What the court says is of interest, but what it does is much more important. It may be well to call attention to the fact also that in many of the earlier cases the expressions of the court were frequently ones regarding the importance of the case rather than expressions of real reluctance to pass upon it.

Dr. Moore's third chapter analyzes the cases in which federal statutes have been declared unconstitutional by the United States Supreme Court and here his work is of very real value in that it seeks to determine the effect of such decisions. In some respects Dr. Moore's statements about a case do not harmonize with each other as, for example, the comments upon the case of Counselman vs. Hitchcock (pp. 107, 108, 115). Here also the subsequent interpretation given to the immunities clause obviates the difficulty with respect to corporations to which the author refers on page 107, and this development deserved attention in the author's discussion.

In his treatment of the results accomplished by decisions the author is, perhaps, too much inclined to look at the words of the court rather than to study out the effects of the court's decision. He is, of course, per-

fectly right in saying that the court has failed whenever it has attempted to settle an important political question by judicial decision (pp. 123, 124). In such matters the failure of the judicial decision is pretty clear, but in less important matters the court often by gradual steps withdraws from a position it has once taken. Such a withdrawal, taking place largely by indirection, is not easily detected until the transition is completed. So, for example, the court has already departed to a large extent from the principles on which the Adair case was based, and may find it possible to avoid later the effects of that decision.

A case which has been decided by the court since Dr. Moore wrote shows clearly the manner in which the court may, without overruling itself, reach a position different from that taken in an earlier decision. In the first Employers' Liability Cases, 207 U. S., 463, an act of congress of 1906 regulating the liability of interstate carriers to their employees was declared invalid because not limited to the interstate business of such carriers and to the employees of such carriers who were themselves engaged in interstate commerce. Congress substantially reënacted the legislation in 1908, providing expressly that it should be applicable to the interstate commerce business of railroads and to the employee "while he is employed by such [interstate] carrier in such [interstate] commerce." The act was then upheld in the Second Employers' Liability Cases, 223 U. S. 1. In Pederson vs. Delaware, Lackawanna and Western R. R. Co., 229 U. S. 146 (May 26, 1913) the court, in a decision approved by six members, held that a workman employed in carrying materials to be used in the repair of a track upon which interstate commerce passed, was himself engaged in interstate commerce. This decision goes a long way toward bringing within the terms of the 1908 valid law the employees because of whose inclusion the 1906 law was held invalid. Yet nothing in any of these decisions indicates the result so accomplished.

Dr. Moore's monograph is of especial value as a study of the manner in which judicial power is exercised and of the results of such exercise. Most of the discussion of this subject has been from a purely legal standpoint, and has failed to recognize that the judicial control over legislation, as one of our most important political or governmental institutions, must, like all other such institutions, be judged by its results. The reviewer hopes that Dr. Moore may continue his work by analyzing the cases in which the United States Supreme Court has declared state statutes unconstitutional. This would be, of course, a much larger and more difficult task than that which the author has here undertaken.

W. F. Dodd.